Office Supreme Court, U.S.
FILED
MAR 5 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term 1959

No. 763

SALVATORE SANTORA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed the conviction of petitioner (and others) of conspiracy to violate the narcotics laws, 21 U.S.C. §§ 173 and 174.

The Opinion Below

The Court of Appeals opinion is not yet reported. A copy has been supplied by one of the other convicted defendants, Charles Di Palermo, in his petition, No. 750 Misc. of this Term.

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on January 12, 1960.

(ii) Timely application for rehearing was denied on January 29, 1960. Petitioner's time to file his petition was extended to March 11, 1960 by an order of Mr. Justice Harlan.

(iii) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Did the courts below err in not granting petitioner's motion for a directed verdict of acquittal?

2. Is it consonant with the administration of justice to permit a conviction to stand when the Court of Appeals has rested its judgment on substantial misconceptions of the evidence relating to petitioner?

3. Is it consonant with the administration of justice to permit an opinion of the Court of Appeals to remain uncorrected when based on substantial misconceptions of the evidence relating to petitioner?

4. Was it material error for the trial court to permit the jury to consider evidence relating to a certain meeting when the Court struck out the overt act relating to the same meeting?

5. Was it error for the trial court to refuse to direct the government to permit defense counsel to confer with the witness Cantellops, who was under the control of the government?

6. Was it error for the trial court to permit the case to go to the jury in view of the repeated perjuries committed by Cantellops both prior to and during the trial?

7. Was it error for the trial court to refuse to declare a mistrial in the light of the improper publicity given the case?

8. Was it error for the trial court to refuse to declare a mistrial after the outburst of defendant Fiano against his co-defendants?

Statutes Involved

None are specifically involved.

Statement of the Case

Upwards of a dozen persons were charged with conspiracy to violate the narcotics laws, 21 U.S.C. §§ 173 and 174. The indictment charged that the conspiracy continued from February 1, 1955 to July 7, 1958 (See S.M. 6).

The only evidence purporting to link petitioner with this conspiracy was given by an informer and jailbird, one Cantellops. While he gave testimony covering the period March 1955 to May 1957, he referred to petitioner only on a few days in August 1956. Cantellops testified to numerous meetings of others at which questions of policy were said to have been discussed, but said that petitioner Santora was not at any of them (S.M. 1382, 1383, 3476-3485). The entire evidence relating to Santora is set forth in his appendix below (pp. 6a-12a) and is as follows:

In August 1956 Santora was present at a meeting at which others discussed a proposed trip to Mexico (App. 6a). There was no testimony that petitioner said anything on that occasion, but others did (App. 7a, 8a).

A few days later Santora was perhaps present when a friend of his, one Ormento, paid Cantellops for a trip

he had taken to Philadelphia at Ormento's request (App. 8a, 9a).* Again petitioner said nothing (see App. 10a).

This was followed by Cantellops being called by petitioner and receiving instructions from him for a "trip for Santora" (App. 10a, 11a). A few days later Santora paid Cantellops for that trip in the presence of others (App. 12a). Cantellops himself characterized Santora as the "owner" of that Philadelphia venture (S.M. 3571, 3572). And after that there is no further mention of Santora in the entire record.

As the table on the opposite page shows, the pattern of the trip taken by Cantellops for petitioner differed from the pattern of his other trips in 1956, both in respect to the person who gave the instructions and made payment—in all other cases it was Ormento—and because of the absence of any "security" man at the point of delivery in the case of the second Philadelphia trip, which was petitioner's.

On the basis of this testimony petitioner's counsel moved for dismissal at the end of the government's case on the ground that the Philadelphia trip with which Santora was connected was not shown to have had any relation to the conspiracy, but was an independent venture of Santora's (See S.M. 5926-5938). The motion was renewed at the end of the entire case (S.M. 6115)—at which time decision was reserved (S.M. 6136). After verdict the motion was renewed and then denied (S.M. 7418).

In its charge to the jury the trial court withdrew Overt Act No. 15 from consideration by the jury (R. 7164). This alleged:

> "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the

* Doubt is cast on petitioner's presence when the money was passed because on cross-examination Cantellops testified that he received this money in a bar and that Santora was not there (S.M. 3565, 3566).

Chart of Trips During 1956 While Ormento Was Allegedly in the Conspiracy

(All references are to Stenographer's Minutes)

Date	*Trip*	*Who Gave Instructions*	*Security Man*	*Who Paid Him*
(1183) June or July, 1956	Cleveland	Ormento (1185)	Charlie Brody (1213)	Ormento (1216)
(1217) End of July Beg. of Aug. 1956	Miami	Ormento (1219)	Mexican (1232)	Ormento (1237a)
(1240) Middle of Aug. 1956	1st Phila.	Ormento (1240)	Mazzie (1245)	Ormento (1247)
(1248) Within few days after 1st Phila. trip	2nd Phila.	Santora (1249)	Nobody	Santora (1252)
(1321) End of Aug. Beg. of Sept. 1956	Puerto Rico	Ormento (1323)	Laurensano (1325)	Ormento (1336)

> month of July 1956, in the Southern District of New York, the defendants John Ormento, Rocco Mazzie, Nata[illegible] Evola, Salvatore Santora and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York."

Counsel had moved to strike the testimony relating to this act and later argued that it should have been withdrawn from the jury (S.M. 7423-7429).

* * *

In the opinion of the Court of Appeals reference was made to Santora in only three places. And, as was pointed out in the petition for rehearing, each of those references was inaccurate. Indeed, we respectfully suggest that the inaccuracies are so great and flagrant as to vitiate the conclusion reached by the court below.

a. In its discussion of the case against Santora the court below said (2486*):

> "Ralph ** Santora was sufficiently implicated in the conspiracy by his attendance at several meetings as well as by his use of Cantellops to deliver narcotics to Philadelphia on two occasions, as mentioned above."

As to the first of these statements referring to attendance at meetings, it is respectfully submitted that mere association, presence or even knowledge of the existence of a conspiracy has not been held by this Court to be sufficient to uphold a conviction. As to the second statement that Santora was implicated in two trips to Philadelphia, it is respectfully submitted that, as we develop hereafter, there is no testimony supporting this statement.

b. In its general discussion of the case the court below referred (2478) first to the meeting at which the trip to Mexico was discussed and said that this was discussed

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*These references are to the "slip" opinion contained in the certified record.

** An incorrect first name, moreover.

with Santora. There was, we submit, no testimony of any discussion with Santora. While Cantellops placed him in the room where the discussion took place, Cantellops attributed not a single word or comment to Santora, but did testify to specific statements by others (App. 7a, 8a). For all that appears Santora was a mere passive listener.

c. The next mention of Santora (on the same page) is that he was present when Ormento paid Cantellops off for the first Philadelphia trip. Though supported by Cantellops' direct testimony (App. 8a, 9a), this is completely negatived by his admission on cross-examination that he had been paid for that trip at a bar at which Santora was not present (S.M. 3565, 3566).

But the evidence wholly fails to show that Santora had any connection whatever with that trip. Thus the Court's later statement, when discussing the sufficiency of the evidence against Santora (2486), that he used Cantellops to deliver narcotics to Philadelphia "*on two occasions*" is wholly unwarranted.

d. Another statement made by the court below (2478) is that Ormento told Cantellops that Santora would have "another" trip for him. This is not borne out by the record. For when Cantellops said that the trip for Santora was "another" trip to Philadelphia (App. 10a), he was not quotnig Ormento, but merely giving his own conclusions. What he said about Ormento was that he had been asked "if I wanted to make a trip for Santora" (App. 10a). He had testified before the grand jury that Santora had told him that he, Cantellops, had been recommended "very good" (S.M. 3586).

e. Finally (2484), the Court described Santora as one of the "principal conspirators." There is no support for this in the record. Such had been the government's contention in its opening (S.M. 17, 24). There it was stated that Santora participated in certain policy-making meetings. But Cantellops did not support that claim. His

testimony expressly excluded Santora from each of these important meetings: on the East Side in 1955, in the Bronx in 1956, and on the East Side in 1957 (see S.M. 3476-3485).

Moreover, the indictment charged that the conspiracy embraced the period February 1, 1955 to July 7, 1958 (see S.M. 6). Cantellops gave testimony with respect to acts covering the period from March 1955 to May 1957 (S.M. 992, 1386). Yet Santora appears on the scene only during a few days in August 1956. And there is no testimony whatever that he spoke a single word except in relation to the one trip to Philadelphia of which Cantellops said he was "the owner." How can it possibly be said under such circumstances that Santora was one of the "principal" conspirators.

The Court of Appeals (2486) upheld the refusal to expunge the evidence which underlay Overt Act No. 15 on the theory that the trial court had believed that a variance in Cantellops' testimony with regard to the place at which the meeting took place required striking the Act and that this was erroneous.

For other aspects of the case, which affect a large number of those convicted, petitioner refers to, and incorporates by reference, the matters referred to in the Statement of the Case contained in the other petitions in this case.

Reasons for Granting the Writ

In addition to the grounds common to various defendants (covered by questions 5-8 *supra*) and elaborated in other petitions in this case (particularly those of Joseph Di Palermo, Vito Genovese and Carmine A. Polizzano), which we hereby adopt and incorporate by reference, this petitioner respectfully urges upon the Court the importance of his own case in the administration of justice by the federal courts. We submit that the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power

of supervision, and has decided a federal question in a way in conflict with applicable decisions of this Court.

1. We have here an individual charged with and convicted of participation in a widespread conspiracy covering a period of several years. Yet the only testimony which refers to him covers, at most, four occasions over a period of a few days. On the first occasion he was a passive bystander; on the second there was talk about his conducting a venture, of which the only witness against him said he was its "owner;" on the third he made the arrangements for this venture; on the fourth he paid for it. And then he disappears from the scene. Moreover, the pattern followed in connection with this one venture differed materially from that followed in connection with the other ventures about which that witness testified.

It is difficult to understand how, on such a record, the conviction of this petitioner could have been upheld. But an examination of the opinion of the Court of Appeals, as already outlined above, shows such a misconception of the facts disclosed by the record as, by itself, to constitute a miscarriage of justice.

It is inconceivable that the Court below would have affirmed as to this petitioner in the light of its own earlier decisions (*United States* v. *Reina*, 242 F. 2d 302; *United States* v. *Euphemia*, 261 F. 2d 441, and *United States* v. *Stromberg*, 268 F. 2d 256) and this Court's decision in *United States* v. *Di Re*, 332 U. S. 581, except on the basis of a misunderstanding of the record.

Moreover, if the Court below, despite the mistakes in its opinion, intended, by its summary denial of the application for rehearing, to rule that the proof against this petitioner as set out in the petition for rehearing was sufficient, then its ruling is at variance wtih the principle laid down by this Court in the *Di Re* case, *supra*.

Any other principle would approve the conviction of this petitioner for conspiracy because it had been shown that he associated with others against whom there was more

extensive testimony of participation in the conspiracy. But that would amount to "guilt by association" often condemned by this Court: *Schneiderman* v. *United States*, 320 U. S. 118; *Bridges* v. *Wixon*, 326 U. S. 135; cf. concurring opinion of Mr. Justice Frankfurter in *Von Moltke* v. *Gillies*, 332 U. S. at 728. See also 53 Col. Law Rev. 228-242; 57 Col. Law Rev. 387-405; 61 Harv. Law Rev. 592, 599, ff; 62 Harv. Law Rev. 276-286.

This case, indeed, presents in its most extreme form the extended conspiracy theory deplored in *Krulevitch* v. *United States*, 336 U. S. 440, 446, 447.

2. The trial court refused to strike the testimony about the hotel meeting at which petitioner was alleged to have been present in August 1956, despite its withdrawal of the Overt Act based on that meeting (No. 15). That refusal presents an important question in the administration of federal criminal law which has never been passed on by this Court, and should be.

In the nature of this case it must be supposed that the trial court withdrew that Overt Act from consideration by the jury because it believed the testimony with regard to it not sufficiently probative to permit the jury to rely on it. No other explanation is possible here. How then can it be permitted to a jury to draw any inferences from such testimony? It, as well as the Act to which it relates, should be withdrawn from the jury.

We have found no case which deals with this precise point. In the court below the government relied on *Baker* v. *United States*, 276 Fed. 283, and *Kolbrenner* v. *United States*, 11 F. 2d 754, cert. den. 271 U. S. 677. But they do not dispose of our case.

In the first of these the overt act was stricken because of the statute of limitations, not because of any doubt about the quality of the evidence. In such a situation to permit the jury to consider the evidence is merely in line with the general rule in conspiracy cases that evidence prior to the period of limitation is admissible for background purposes.

In the second the overt act was not stricken. There was merely objection to testimony concerning it on the ground of variance. The testimony was held admissible because it bore on the general issue of conspiracy.

The court below evidently sought to bring this case within the rule of *Kolbrenner* by suggesting (p. 2486) that the trial court had expunged Overt Act No. 15 because of a "variance" with respect to the location of the hotel at which the meeting took place (86th Street rather than 85th, as alleged). But as the court below correctly pointed out, such a "variance" would not have justified striking the Overt Act. There is no reason to suppose that the trial court was not also aware of this. Is it not much more reasonable to conclude that the trial court expunged Overt Act No. 15 because of the general unreliability of Cantellops' testimony to which it referred in its charge before it withdrew the Overt Act? (R. 7158).

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Accordingly, we respectfully submit that this case presents various important problems which need clarification by this Court. If there were nothing else in the case, indeed, but the misconception of the facts by the Court below, the intervention of this Court is essential. For, as so often has been said, legal action is nothing unless it appears to be just and proper. And what can more cast discredit on the processes of the law than to allow to pass uncorrected a decision depriving a man of his liberty which appears, as does this, to rest on a series of erroneous statements by the Court of Appeals.

We respectfully submit, therefore, that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the conviction of petitioner.

Respectfully submitted,

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